Petition

81-2007

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981.

No. _____

THE DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, and THE HONORABLE MARVIN W. FOOTE, One of the Judges thereof,

Petitioners,

v.

GALEN MARKS, ROBERT R. LARSEN, JOHN VOWELL, and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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QUESTIONS PRESENTED

1. Has the Colorado Supreme Court errored in law in its determination that it had jurisdiction to render the judgment and order of new trial subject of this petition?

2. Has the Colorado Supreme Court errored in law in its determination that the trial Court to which its order for new trial is directed has a continuing jurisdiction?

3. Has Donald E. Tyler, plaintiff in the case to which the writ of prohibition issued in the judgment subject of this petition, been deprived of his property right to enforceable judgment and its enforcement in a civil case for damages without jurisdiction and without due process of law?

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IN THE

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THE DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, and THE HONORABLE MARVIN W. FOOTE, one of the Judges thereof,

Petitioner

v.

GALEN MARKS, ROBERT R. LARSEN, JOHN VOWELL, and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The District Court in and for the Seventeenth Judicial District of the State of Colorado, and the Honorable Marvin W. Foote, one of the Judges thereof, the petitioners herein, by Donald E. Tyler appearing in their behalf and a real party in interest, pray that a writ of certiorari issue to review the judgment of the Colorado Supreme Court entered on March 8, 1982, in the case entitled Galen Marks, Robert R. Larsen, John Vowell, and Brighton Community Hospital Association v. The District Court in and for the Seventeenth Judicial District of the State of Colorado, and the Honorable Marvin W. Foote, one of the Judges thereof, and the denial of petition for rehearing on March 29, 1982.

OPINIONS BELOW

The judgment of the Colorado Supreme

Court is to be reported at ___Colo__, __P.2d ____, and is printed in Appendix A hereto, infra, pages A-1 through A-18. Its order denying petitions for rehearing is printed in Appendix A hereto, infra, A-19 through A-20.

JURISDICTION

The judgment of the Colorado Supreme Court (Appendix A, pages A-1 through A-18) was entered March 8, 1982. A timely petition for rehearing was denied on March 29, 1982. (Appendix A, pages A-19 and A-20.) This petition is timely filed in accord with 28 U.S.C. § 2101. The jurisdiction of the U.S. Supreme Court is invoked under the Fourteenth Amendment of the U.S. Constitution. Being issued without jurisdiction, the judgment in writ of prohibition ordering a new trial deprives Donald E. Tyler, plaintiff in the case subject of that writ, of

his valuable protected property right of final enforceable judgment for damages without due process of law. Issuance of a writ of prohibition is a final judgment subject to review by this Court. Detroit & M.R.Co. v. Michigan R. Commission, 240 U.S. 564, 60 L.Ed. 802, 36 S.Ct. 424 (1916).

QUESTIONS PRESENTED

1. Has the Colorado Supreme Court errored in law in its determination that it had jurisdiction to render the judgment and order of new trial subject of this petition?

2. Has the Colorado Supreme Court errored in law in its determination that the trial Court to which its order for new trial is directed has a continuing jurisdiction?

3. Has Donald E. Tyler, plaintiff in the case to which the writ of prohibition issued in the judgment subject of this petition, been

deprived of his property right tc enforceable judgment and its enforcement in a civil case for damages without jurisdiction and without due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> ..."nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Article II of the Constitution of the State of Colorado provides in pertinent part:

> Sec. 6. Equality of Justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be adminstered without sale, denial or delay.
> Sec. 25. Due process of law. No person shall be deprived of life, liberty or property without due process of law.

The Colorado Rules of Civil Procedure provide:

Rule 97. Change of Judge. A judge shall be disqualified in an action in which he is interested or prejudiced, or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court adminstrator who shall obtain from the Chief Justice the assignment of a replacement judge.

Rule 58. Entry of Judgment. (a) Entry. Subject to the provisions of Rule 54(b): (1) Upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs, or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare and enter the judgment on the register of actions as provided in Rule 79(a) without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict, or a

general verdict accompanied by answers to interrogatories, the court shall promptly prepare a written form of the judgment, and the clerk shall thereupon enter it on the the register of actions as provided by Rule 79(a); (3) the date the judgment is ordered in open court, in chambers, or under the provisions of Rule 55 regarding default, shall be the effective date of entry of judgment regardless of when noted in the register of actions. ... If the court makes an oral ruling from the bench and directs counsel to prepare a written order of judgment, the judgment shall not be entered or be effective until the court signs the written order of judgment. However, a notation in the register of actions shall reflect the nature of the oral ruling and the directions to counsel. Thereafter, upon the signing of the written order, the judgment shall be entered and be effective. (Amended May 26, 1977, effective August 1, 1977) (emphasis added)

Rule 59. New Trials; Amendment of Judgments. (a) Grounds. A new trial may be granted to all or any of the parties, and on all or part of the issues, after trial by jury, court, or master. On a motion for a new trial in an action tried without a jury, ...
Subject to the provisions of Rule 61, a new trial may be granted for any of the following causes:
(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial;

(2) Misconduct of the jury;
(3) Accident or surprise, which ordinary prudence could not have guarded against;
(4) Newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;
(5) Excessive or inadequate damages;
(6) Insufficiency of the evidence;
(7) Error in law.
When application is made under subsection (1), (2), (3), or (4) it shall be supported by affidavit filed with the motion. When application is made under any of the subsections (1) to (7) unless otherwise specifically ordered by the court there shall be filed with the motion a short memorandum brief including authorities, if any, upon which the applicant relies in support of the motion.
(b) Time for Motion. A motion for new trial shall be filed not later than fifteen days after the entry of the judgment, or such further time as may be allowed by the court; except that a motion for a new trial on the grounds of newly discovered evidence may be made after the expiration of such period and before the expiration of six months after the entry of the judgment with leave of court obtained on notice and hearing and on a showing of due diligence. A motion filed as herein provided for shall at the time it is filed be set expeditiously for hearing by the court.
(c) Time for Filing and Serving Affidavits. When a motion for a new trial is based

upon affidavits they shall be filed with the motion. The opposing party has ten days after service thereof, within which to file opposing affidavits, which period may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.
(d) On Initiative of Court. Not later than fifteen days after entry of judgment the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.
(e) ...

Rule 6. Time. ... (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), 60(b), except to the extent and under the conditions therein stated.

STATEMENT OF CASE

The controlling issue in this case is simply the right to equal application of clear mandatory jurisdictional rules of procedure in due process of law. Review is requested herein of issuance of writ of prohibition and order of new trial by the Colorado Supreme Court. Detroit & M.R.Co. v. Michigan R. Commission, supra. It is submitted that it lacked jurisdiction to issue the order of new trial and that the trial court lacks jurisdiction to continue. The case falls within the holding in Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886). The case to which the writ of prohibition is directed is as a matter of law concluded and the state courts continue without jurisdiction and without due process of law deprive the plaintiff therein of his valuable property right of final enforceable judgment.

In another original proceeding, the Colorado Supreme Court ordered entry of judgment in the underlying case subject of the present writ of prohibition. After that order of entry of judgment, continuing jurisdiction of the trial court and of the Colorado Supreme Court required motions by defendants for new trial or judgment n.o.v. or order of new trial by initiative of the court within 15 days. Rules 58, 59, C.R.C.P., supra. None of the mandatory requirements of Rule 59 occurred. Defendants moved for new trial 31 days after the effective date of entry of judgment, 16 days too late. The trial Court did nothing for four months after the effective date of entry of judgment by Rule 58, C.R.C.P., and for more than three months after entry of judgment in the register of actions.

Claim of jurisdiction by the trial Court and by the Colorado Supreme Court is based upon one or more of the following contested propositions: (1) orders allowing for enlargement of time to file motions for new trial issued by disqualified judges with no jurisdiction were valid; (2) mandatory time limits for continuing jurisdiction after trial do not apply here because of "exceptional circumstances" following Harris Truck Lines v. Cherry Meat Packers, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261; and (3) a null and void mistrial order on the record caused the entered judgment to be invalid subjecting it to striking and subsequent entry of judgment establishing a new date of entry of judgment.

It is submitted that the Colorado Supreme Court errored on each of those three propositions and it lacked jurisdiction to order new

trial. Jurisdiction of the case by the trial Court and by the Colorado Supreme Court was exhausted except for duty to reinstate the entered judgment, enforce it, and correct the record as to matters entered without jurisdiction. The petitioners submit that the plaintiff below, Donald E. Tyler, is entitled to that relief, and end to the litigation.

Judgment for damages is a property right protected by the Fourteenth Amendment. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U.S. 1, 19, 38 L.Ed. 55, 64-65 (1893). Trial by jury in civil suits for legal claims as herein is a matter of right in Colorado. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973). The Colorado Supreme Court has deprived the plaintiff of his right to benefits of jury trial without jurisdiction, without due process of law.

The underlying case, subject of the writ of prohibition for which review is sought herein, was tried to a jury which announced its verdict March 6, 1980. Its verdict is appended, Appendix A, infra, pages A-21 and A-22. Interrogatories aswered by the jury are in Appendix A, infra, pages A-23 through A-26. In presence of the jury the Court ordered entry of judgment on the verdict and that judgment was written under the direction of the Court and signed by him on March 17, 1980, nunc pro tunc March 6, 1980.

On March 6, 1980, for only the cause shown that trial docket of counsel for defendants was busy for the "next 30 days," defendants were granted 30 days from March 6, 1980, to file post trial motions, being limited to that period by the cause shown.

Rule 6(b), C.R.C.P., supra. The motions with cause shown and order were recorded in the trial transcript provided the defendants by the plaintiff with his petition for writ of mandamus or prohibition filed on March 25, 1980. There is no claim by defendants-respondents that they later relied upon that enlargement of time. There is positive conclusive evidence that they did not later rely upon that enlargement of time. Even if it is proposed that they relied upon it, as implied by the Colorado Supreme Court in its decision (pages A-9 through A-11), the 30 days is still short. The first post trial motions were filed September 5, 1980. To be shown, that was 31 days after entry of judgment August 5, 1980, a day late.

In a post trial hearing, after the above grant of enlargement of time, on March 6, 1980, the Court granted defendants' motion for mistrial and ordered the judgment vacated. Upon petition by the plaintiff, Donald E. Tyler, original proceeding by the Colorado Supreme Court for writ of mandamus or prohibition followed. The resulting decision is reported as Tyler v. Dist. Ct., 613 P.2d 899 (Colo., 1980), and is printed in Appendix A, infra, pages A-27 through A-35. Review included the aforementioned order of judgment on the jury verdict written, signed, and entered nunc pro tunc March 6, 1980.

No particular form of judgment is required in Colorado provided the rights of the parties can be ascertained. An action which terminates the proceedings is a final judgment. Jones v. Galbasini, 299 P.2d

503 (Colo., 1956). The Colorado Supreme Court publicly announced and in writing its decision aforementioned on July 14, 1980. It found the interrogatories as answered by the jury to be consistent with its verdict. It stated the amounts of damages found by the jury and against whom the damages were assessed. It then ordered entry of judgment on the jury verdict. The order of final judgment was complete; the rights of the parties were clearly and plainly completely ascertainable. Nothing remained to be done but the ministerial task of re-entering or reinstating the judgment. Twice the judgment in accord with the jury verdict had been determined in writing, first on March 17, 1980, by the trial Court and again on July 14, 1980, by the Colorado Supreme Court. The Supreme Court concluded the entry of

judgment here was not ministerial with the only apparent reason being that it had ordered vacation of the mistrial order in addition to its order for entry of judgment. (Appendix A, pages A-8 and A-9). It is submitted that the mistrial order was a nullity, and its vacation was non-essential and surplusage at that point.

The Supreme Court stated, "(W)e vacate as an abuse of discretion the trial Court's order for a mistrial." (Appendix A, page A-30) The order of mistrial exceeded the lawful authority and jurisdiction of the trial court. Relief was obtained through proceedings limited to excess of jurisdiction

and acts without jurisdiction. People ex rel. Barnum v. District Court, 74 Colo. 48, 218 P. 912 (1923); People ex rel. Lackey v. Dist. Ct., 30 Colo. 123, 69 P. 597 (1902). Being issued in excess of authority, the mistrial order was void and a nullity whether vacated or not. Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 353-354, 41 S.Ct. 116, 65 L.Ed. 297, 300 (1920); 21 C.J.S. p. 177. Vacation of the order of mistrial is surplusage and just a matter of cleaning the record after entry of judgment was ordered. That is the usual and accepted procedure. When a court finds it lacked jurisdiction for matters entered in the record, the judgment is not invalidated but it becomes the duty of the court to correct the record and restore the status quo as existed prior to such entries. Brown v. Fundamental Baptist Tabernacle,

117 Colo. 157, 184 P.2d 494 (1947); Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949); U.S. v. Morgan, 307 U.S. 183, 196, 59 S.Ct. 795, 83 L.Ed. 1211, 1220 (1938); 21 C.J.S. pp. 179-180. Being a void nullity it logically follows that the mistrial order could have no effect upon the validity of any judgment entered before or after.

The court had ordered entry of judgment prior to ordering mistrial. The status quo of the plaintiff prior to the Court's exceeding its jurisdiction was clearly the judgment entered March 17, 1980, nunc pro tunc March 6, 1980. All acts by the trial Court after the order of entry of judgment on March 6, 1980, other than signing the order on March 17, 1980, were in excess of jurisdiction and without jurisdiction. It is submitted that it was the duty of the Colorado Supreme Court in the proceeding

subject of this petition to order and secure that status quo.

The defendants submitted petitions to rehear the aforementioned July 14, 1980, decision of the Supreme Court which were denied on August 5, 1980. (Appendix A, pages A-36 and A-37) Jurisdiction of the trial court and for appellate courts thereafter depended upon filing motions for new trial or judgment n.o.v., or action by the trial court, within 15 days after effective date of entry of judgment. Rule 59, C.R.C.P., supra. Such timely filing of post trial motions is mandatory for continuing jurisdiction by Rule 59, C.R.C.P., and by established precedence in Colorado. Niles v. Shinkle, supra; Austin v. College/University Ins. Co. of America, 30 Colo. App. 502, 495 P.2d 1162 (1972); Sullivan v.

Modern Music Co., 137 Colo. 292, 324 P.2d 374 (1958); Graham v. Dist. Ct., 137 Colo. 233, 323 P.2d 635 (1958); SCA Serv. Inc. v. Gerlach, 543 P.2d 538 (Colo. App. 1975).

Date of entry of judgment for purposes of Rule 59 is determined by Rule 58. City and County of Denver v. Just, 487 P.2d 367 (Colo., 1971); In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976). Rule 58, C.R.C.P., as amended after Just, supra, and after Gardella, supra, provides that the date of entry of judgment is the date it is ordered. The date of entry of judgment here was established as August 5, 1980, by virtue of denial for rehearing on that date by the Supreme Court of Colorado.

On August 20, 1980, and on September 4, 1980, the defendants sought extensions of time in which to file post trial motions by

presenting motions to disqualified judges. The extensions of time were ostensibly granted by Judges Jacobucci and Delaney. Motions and orders are appended, Appendix A, pages A-38 through A-47. Pursuant to Rule 97, C.R.C.P., supra, both Judge Jacobucci and Judge Delaney had disqualified themselves on or before June 23, 1976, evidenced by a letter to the Chief Justice of the Colorado Supreme Court which is printed in Appendix A, infra, pages A-48 and A-49. The trial judge, the Honorable Marvin W. Foote, was retired as chief judge of another judicial district and was assigned to preside over this case. Defendants knew that he was not a judge of the Seventeenth Judicial District; they have not claimed otherwise. Extensions of time were needed on or before August 20, 1980.

They required cause shown and exercise of discretion. Rule 6(b), C.R.C.P., supra; Niles v. Shinkle, supra; Marcotte v. Olin Matheson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967). Rule 6(b), C.R.C.P., is the same as the federal rule which has been held to be mandatory and jurisdictional. U.S. v. Robinson, 361 U.S. 220, 229, 80 S. Ct. 282, 4 L.Ed.2d 259, 265 (1960).

It is well established in Colorado that a disqualified judge must strictly comply with Rule 97, C.R.C.P., supra, and he has no jurisdiction except to obtain another judge. Disqualification of a prejudiced judge is a basic principle not to be subjected to narrow or technical construction and is applied to all classes of cases, civil or criminal. Lawson v. People, 165 P. 771 (Colo., 1917); Brouwer v. Dist. Ct., 169 Colo. 303, 455 P.2d 207 (1969); Erbaugh

v. People, 57 Colo. 48, 140 P. 188 (1914); People v. Dist. Ct., 192 Colo 503, 560 P.2d 828 (1977); People ex rel Burke v. Dist. Ct., 60 Colo. 1, 152 P. 149 (1915). Furthermore, litigants hava right to an impartial judge protected by the Foruteenth Amendment of the U.S. Constitution. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) Clearly, the orders of extensions of time by the disqualified judges, their being without jurisdiction, were nullities and were void ab initio. Norton v. Reese, 76 N.M. 602, 417 P.2d 205 (1966); Marcotte v. Olin Matheson Che. Corp., supra.

The motions and orders for extensions of time, Appendix A, pages A-38 through A-47, present no showing or finding of the

location or unavailability of the trial judge, the Honorable Marvin W. Foote, petitioner here. The source of the Supreme Court's information is undisclosed and unexamined. His location at pertinent times is not in the record, was and continues to be withheld from the plaintiff (Tyler), and furthermore is irrelevant to the issue of jurisdiction. There was no showing of any attempt to obtain a qualified judge. The motion of August 20, 1980, (Appendix A, pages A-38 through A-42) clearly reveals defendants' knowledge that continuing jurisdiction depended upon filing motions for new trial or judgment n.o.v. in time related to the action of the Colorado Supreme Court which ended August 5, 1980. They indicated the appearance of belief that they had until August 22, 1980. The August 22 date is an

error and has no significance other than to reveal that counsel for defendants, consisting of three firms of busy defense lawyers practicing in Denver, Colorado, knew that by Colorado practice that the date of entry of judgment had been established by the decision of the Colorado Supreme Court. The date of entry of judgment by established precedence was August 5, 1980. Remittitur had no effect on that date. Haggot v. Plains Iron Works Co., 74 Colo. 37, 218 P. 909 (1923). There is no claim that the defendants-respondents relied upon the extension of time granted on March 6, 1980. If so, they would not have sought enlargements of time on August 20, 1980. They have presented no claims of excusable neglect. There is no claim that they did not know that Judges Jacobucci and Delaney were disqualified. They sought the aid of

two disqualified judges and relied upon their void orders. It is not a matter of relying upon an erroneous misleading order of a trial Court to fall in the exceptional circumstances of the type in Converse v. Zinke, 635 P.2d 882 (Colo., 1981). The order on March 6, 1980, granting 30 days from that time to file post trial motions was not erroneous, misleading, nor relied upon by defendants-respondents.

The first motion for new trial or judgment n.o.v. was filed September 5, 1980, 31 days after entry of judgment August 5, 1980. It was 16 days too late. It was one day too late even if the defendants-respondents are erroneously allowed the 30 days by misapplication of the Court's order on March 6, 1980.

The Colorado Supreme Court ruled that

the trial judge could order a new trial within 15 days after entry of judgment on December 4, 1980. It is submitted the Court errored.

Rules 58 and 59, C.R.C.P., apply to the judge as well as to the parties and govern the jurisdiction of the state courts to continue. Jurisdiction to order a new trial is exhausted if nothing occurs within 15 days after effective date of entry of judgment. The judge's time to act is not subject to enlargement. Rules 59(d) and 6(b), C.R.C.P.; Lapizak v. Zaist, 451 F.2d 79 (2nd Circ, 1971). The only way the trial court may alter, amend, or vacate a judgment is by appropriate action under Rule 59 or 60. (Rule 60 does not apply here). Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961). After Cortvriendt, the amended Rule 58 applying to Rule 59 established entry of judgment as the date it

was ordered, delayed by petition for rehearing until August 5, 1980. As will be conclusively shown, the judge could not act pursuant to Rule 59(d) on or after December 4, 1980.

The mandate of the Supreme Court (page A-33) directed entry of judgment in accord with the jury verdict. That judgment had been determined by the Supreme Court and written previously by the trial Court on March 17, 1980. Clerks, not judges, enter judgments. Rule 58, C.R.C.P. The Clerk was a named respondent along with the judge. Pursuant to the mandate, the Clerk properly performed his ordered duty and entered the judgment in the register of actions on August 26, 1980, nunc pro tunc March 6, 1980.

The Supreme Court in proceeding herein requested to be reviewed stated (page A-8):

> "No judgment was entered upon the judge's verdict inasmuch as the trial

judge declared a mistrial and ordered a new trial."

Minute order signed March 17, 1980, the only pertinent entry and part of the record to the Supreme Court in the proceeding petitioned herein to be reviewed reads:

"IT IS ORDERED that the Defendant's Motion for mistrial is granted and the Judgment entered previously is vacated. The Court instructs the Plaintiff he may obtain a date for a new trial or file an appeal on the Court's ruling."

No motion for a new trial was made, no new trial was ordered, and there was no new trial date on the record. Nothing about a new trial was on the record which could conceivably invalidate the judgment. The mistrial order was void and a nullity and could have no effect on the judgment. Vallely v. Northern Fire & Marine Ins. Co., supra. Obviously, the judgment entered in the register of actions on August 26, 1980, was valid and the Supreme

Court errored in plain law in ruling otherwise. Even by the rules prior to their amendment in 1977, the judge could not act on his own initiative to change or invalidate that judgment by Rule 59(d), C.R.C.P., more than 15 days after August 26, 1980. By the amended rules he could not act after August 20, 1980.

In attempting to circumvent jurisdictional rules, the trial Court in its first acts subsequent to March 17, 1980, on December 4, 1980, ordered the judgment entered on August 26, 1980, stricken. (Appendix A, infra, pages A-50 and A-51) The only claimed basis was that the mistrial order was still on the record. He then ordered entry of the same judgment without a nunc pro tunc provision. It is submitted that he

had no jurisdiction to do that or anything else after August 20, 1980, except to enforce the judgment entered and clean the record. Rules 58, 59 C.R.C.P.; Cortvriendt v. Cortvriendt, supra; Lapcizak v. Zaist, supra; Brown v. Fundamental Baptist Tabernacle, supra; Niles v. Shinkle, supra; U.S. v. Morgan, supra.

Clearly, motions for new trial were not filed on time. Motions for enlargement of time in which to file them were void. No justification has been shown for not applying mandatory jurisdictional time rules. The void mistrial order did not make the judgment entered subject to striking. Simply, the jurisdiction to continue was exhausted in spite of all attempts to circumvent the plain meaning of the rules.

On December 10, 1980, the Court ordered new trial on the issue of damages only. Appendix A, infra, pages A-52 through A-56. On March 8, 1982, the Colorado Supreme Court in its judgment subject of this petition, Appendix A, pages A-1 through A-18, ordered new trial as to all issues.

The petitioners by Donald E. Tyler, in answer to rule to show cause properly questioned the jurisdiction of the Colorado Supreme Court and of the trial court to continue. Inasmuch as the Supreme Court assumed jurisdiction it was requested that it exercise its only proper jurisdiction and order reinstatement of judgment nunc pro tunc March 6, 1980, and striking of other matter entered after August 23, 1980.

It is submitted as appropriate in this direct action to correct an error of the

Colorado Supreme Court in its determination of its jurisdiction and that of the trial court. Noble v. Union River Logging R. Co., 147 U.S. 164, 175, 37 L.Ed. 123, 13 S.Ct. 271 (1892); Phillips v. Negley, supra. Want of jurisdiction is apparent on the face of the record of the proceedings and the clear plain meaning of the Colorado Rules of Civil Procedure. "Where the question of jurisdiction is one or law, a court cannot by an erroneous decision acquire jurisdiction which it has not..." 21 C.J.S. p. 177; State ex rel B.F. Goodrich Co. v. Trammell, 192 So. 175, 177 (Fla., 1938). In Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 353-354, 41 S. Ct. 116, 65 L.Ed. 297, 300 (1920) this Court held:

> "Courts are constituted by authority, they cannot go beyond the power delegated to them. If they act beyond that

> authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal."

This Court has authority to mandate the entry of judgment. Martin v. Hunter's Lessee, 1 Wheat 304, 4 L.Ed. 97 (1816); Tyler v. Magwire, 17 Wall 253, 21 L.Ed. 576 (1873); Williams v. Bruffy, 102 U.S. 248, 26 L.Ed. 135 (1880).

Federal Issues Presented

At each opportunity, in answer to rule to show cause, and in petition for rehearing the petitioners have submitted that the plaintiff below, Donald E. Tyler, was being deprived of rights protected by the Colorado Constitution, Article II, sections 6, 23, and 25, and by the 5th, 7th, and 14th Amendments of the U.S. Constitution. In petition for rehearing, it was submitted that the decision subject of this petition

denied the plaintiff his protected property right of a final enforceable judgment for damages without due process of law in violation of the 14th Amendment of the U.S. Constitution. The Supreme Court of Colorado did not address the issue of federal rights.

The underlying case involved claim in the complaint under 42 U.S.C. § 1983, which claim was dismissed by summary judgment as not involving State action. Brighton Community Hospital was a public community hospital, and the city was the primary lessee. The By Laws of the Medical Staff, Art. III, 2 provided:

> "All rights under the constitutions of the United States, Colorado and the laws of the State of Colorado and the United States apply and are available to the members of the staff of this hospital and specifically in reference to their practice in this hospital and membership in the Medical Staff."

REASONS FOR GRANTING THE WRIT

Review of issuance of writ of prohibition with its order for new trial is requested. The underlying case to which prohibition was directed, Tyler v. Marks, et al., respondents here, as a matter of clear plain rule of law is and of right ought to be concluded. The state courts continue without jurisdiction, causing irreparable damage including but not limited to unrecoverable loss of time and expense. If mandatory rules of jurisdiction are not to be applied to the defendants, respondents here, the case can go on ad infinatum. Because of the doctrine of collateral estoppel, this can be expected to be the only opportunity for the plaintiff to obtain review by this Court of the issue presented. That issue is the exhaustion of jurisdiction before December 4, 1980, of the state courts to continue. Without this

review and resulting expected application of law, the plaintiff will continue to be deprived of his liberties and property without due process of law.

The case, Tyler v. Marks, has been actively litigated since June, 1975. The defendants have had their day in court. It has been presented twice to the Colorado Court of Appeals, four times to the Colorado Supreme Court, and subject of a trial to a jury of two weeks' duration.

The plaintiff, Donald E. Tyler, 55 years of age, is a Mayo Clinic-trained board certified urologist whose established medical practice was maliciously destroyed in 1974 by the defendants-respondents, and he has not been able to practice medicine at all since 1977 as a proximate result. He has made original contributions to medical

understanding with publications in seven prominent medical journals. Defendants-respondents scheduled a hearing related to emergency room practice against the plaintiff admittedly without charges. Contrary to the Colorado Supreme Court, there was never an issue of surgical privileges. (False, damaging statement, Appendix A, pages A-2, A-3) Injunctive relief has been denied in spite of their being no charges against the plaintiff. The jury obviously intended to exonerate the plaintiff, Donald E. Tyler, so that he might again render service as a physician. The jury found $682,000.00 actual damages and only $48,000.00 punitive damages indicating that they were not enraged or acting out of spite, bias, passion or prejudice. There was no finding of any

wrongful conduct by the plaintiff who appeared pro se in trial. There were no affidavits and no finding of jury misconduct. Damages awarded are meager for the injuries and damages incurred.

It is further submitted that in order for Rule 59(a)(5), C.R.C.P., to not be violative of the Colorado right to jury trial and the 14th Amendment, the amount of damages must be found to be excessive as a matter of law to allow substitution of the judge's opinion for that of the jury. Miller v. Carnation Co., 33 Colo. App. 62, 516 P. 2d 661 (1973). In this type of case, it is impossible to determine the amount of damages as a matter of law. Clark v. Aldenhoven , 143 P. 267, 26 Colo. App. 501, (1914). Even without the record, the type of case repudiates the judge's precise

assessment of amount and distribution of damages. It makes a mockery of trial by jury. The character of this case is especially such that only the jury is qualified to assess the damages and order of new trial is in conflict with common law, the Seventh Amendment of the U.S. Constitution, and with this Court's decision in Dimick v. Scheidt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1934).

As a proximate result of the conduct of the defendants-respondents and continuing conspiracy, the plaintiff has been forced to live in another state increasing the dificulty in the continuing litigation. The cost to the plaintiff in personal health in the continuing litigation without end has increased since the plaintiff sustained compression fractures of at least three

thoracic and lumbar vertebrae on July 17, 1981, from which he has not recovered.

The plaintiff moved for change of venue to avoid effects of disqualified judges. The motion was contested by defendants-respondents and denied by Judge Foote. Defendant-respondents are estopped from complaining of the inconvenience of submitting motions on time or finding a qualified judge to grant their virtually routine motions for extensions of time.

The Colorado Supreme Court follows its ruling in Converse v. Zinke, 635 P.2d 882 (1981), placing this case within those it allows exception to the mandatory requirement of Rule 6, C.R.C.P. That case and others in which "exceptional circumstances" were found are cases where parties have relied upon misleading or erroneous rulings by trial Courts which extended time under

Rule 6 and Rule 59. It is submitted that the placing of this case in that category is in conflict with the lead of this Court in its intent for narrow application in the cases Colorado relied upon, namely, Harris Truck Lines v. Cherry Meat Packers, supra, and Wolfsohn v. Hankin, 376 U.S. 203, 11 L.Ed.2d 636, 84 S.Ct. 699, reh den 376 U.S. 973, 12 L.Ed.2d 87, 84 S.Ct. 1133 (1964). In those cases the party seeking extension was the innocent victim of erroneous extension of time, and relied upon it to his detriment. In this case, experienced counsel seeking extension of time knowingly sought aid of prejudiced disqualified judges who had no jurisdiction whatsoever and whom counsel knew lacked jurisdiction. They were caught, and the web of procedures thereafter was patently to

cover improper conduct and to circumvent jurisdictional rules. Right to an impartial judge is a matter of substantial federal importance. Judicial codes of conduct are involved. People v. Dist.Ct., 192 Colo. 503, 560 P.2d 828 (1977). The decision of the Colorado Supreme Court subject of this petition condones the acting in combination of lawyers and judges without jurisdiction under color of state law to deprive the plaintiff of his right to judgment without due process of law. That is a matter of substantial federal importance subject to federal statutes. Uniform application to all litigants of mandatory jurisdictional rules of civil procedure is a matter of substantial federal importance. The problem of not being able to rely upon mandatory rules of jurisdiction in this case resulted from decisions of this Court,

and it is submitted that this case was not decided in accord with the intent of those decisions. Harris Truck Lines v. Cherry Meat Packers, supra; Wolfsohn v. Hankin, supra. It is a matter of substantial federal importance that Harris, supra, and Wolfsohn, supra, be clarified and their intended narrow application explained. Rule 6(b), C.R.C.P., and the federal rule from which it is copied, cannot now be relied upon by all litigants. Time of conclusion of a lawsuit is now undeterminable. Appropriate conclusion of litigation by state courts, and their not continuing without jurisdiction, is a matter of substantial federal importance and subject to the Fourteenth Amendment. In the instant case, failure of the Colorado Supreme Court to properly terminate the action by

ordering entry of enforceable judgment and its ordering the continuing of the case in the trial court without jurisdiction deprives the plaintiff in that case, Donald E. Tyler, of his valuable property without due process of law in violation of the Fourteenth Amendment. It is submitted that an individual's rights of this nature, is a matter of substantial federal importance and is at the heart and basis of the founding of this republic. This case involves issues of jurisdictional time for judges to act after trial which have been decided differently in at least five circuit courts of appeal. Lapiczak v. Zaist, supra. This case was also decided in a manner not in accord with decisions of this Court including Tumey v. Ohio, supra, Dimick v. Scheidt, supra, U.S. v. Robinson, supra, Vallely v. Northern

Fire and Marine Ins. Co., supra, Harris Truck Lines v. Cherry Meat Packers, supra, and Wolfsohn v. Hankin, supra.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald E. Tyler
Counsel for Petitioners
1092 S.W. 2nd Ave
Ontario, Oregon 97914

April 23 , 1982

Appendix

APPENDIX A

IN THE SUPREME COURT OF COLORADO

NO. 81SA431

GALEN MARKS, ROBERT R. LARSEN, JOHN VOWELL, and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION, Petitioners,	)	
vs.	)	MARCH 8, 1982
THE DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, and THE HONORABLE MARVIN W. FOOTE, one of the Judges thereof, Respondents.	)	

Original Proceeding

EN BANC RULE MADE ABSOLUTE

Pryor, Carney and Johnson,
Thomas L. Roberts,
Englewood, Colorado

Plaut and Lipstein, P.C.
Frank Plaut,
Lakewood, Colorado

Quiat, Dice & Associated,
Stephen D. Dawson,
Denver, Colorado

Attorneys for Petitioners

Donald E. Tyler,
Ontario, Oregon

Attorney for Respondents.

Justice Lee delivered the opinion of the Court.

In this original proceeding under C.A.R. 21, the petitioners (defendants in the trial court) seek a writ of prohibition restraining the respondent district court from proceeding with a new trial on the single issue of damges rather than a new trial on all issues. The trial court had found that the jury verdict was excessive due to jury bias, prejudice, and passion. The court ordered a new trial on the issue of damages only unless the plaintiff would agree to a lesser award. We issued a rule to show cause why the relief requested by the petitioners should not be granted. We now make that rule absolute.

This action arose out of a dispute concerning Dr. Donald E. Tyler's surgical privileges at the

Brighton Community Hospital. Effective January 1, 1975, Dr. Tyler was barred from membership in the active medical staff of the hospital. Dr. Tyler commenced this action in the district court seeking damages from the hospital and the other petitoners, Gaylon Marks, Robert Larsen, and John Vowell. The action asserted claims for relief in the nature of defamation, breach of fiduciary duties, breach of express contract, outrageous conduct, wrongful interference with the plaintiff's practice of medicine, and conspiracy to remove the plaintiff from emergency room call duty. The case was tried to a jury and verdict in favor of plaintiff Tyler was returned in the amount of $730,000 in compensatory and exemplary damages. On motion for new trial the trial judge found the jury verdict to be excessive and the result of bias, passion, and

prejudice. A new trial on the issue of damages only was ordered unless the plaintiff would agree to remit $588,283.05 of the award which the court deemed to be excessive, leaving in effect a verdict of $141,716.95. The plaintiff refused to remit.

The petitioners assert that the trial court erred as a matter of law in ordering a new trial on the single issue of damages since it had found that the excessive jury verdict was the result of bias, prejudice, and passion. We agree that the trial court should have ordered a new trial on all issues, and now make the rule absolute.

I.

As a preliminary matter several grounds have been asserted to invalidate the motions for a new trial and the orders issued thereon, all of which we find to be without merit.

This case involves a complicated procedural

history. After a jury verdict favorable to the plaintiff had been returned and the jury dismissed, a contradictory signed verdict form was discovered. The trial judge declared a mistrial based on the conflict in the two verdicts. The order for a mistrial was reversed in Tyler v. District Court, __Colo___, 613 P. 2d 899 (1980), where this court directed the trial judge to vacate the order for mistrial and to enter a judgment in accordance with the jury verdict. At the time when the mandate of this court was received by the trial court on August 8, 1980, the trial judge was outside the continental United States. The court clerk, without any order from the court and while the trial judge was absent, entered judgment in the register of actions on August 26, 1980. Counsel for the defendants filed motions requesting successive extensions of time in which to file

post-trial motions. Two judges who had previously disqualified themselves from hearing the case granted the extensions. Motions for judgment notwithstanding the verdict or for a new trial were then filed within the extended periods. The plaintiff then filed a motion to strike the defendants' motions and to vacate orders granting the extension of time for filing such motions.

Thereafter, on December 4, 1980, the trial judge considered all of the motions. He denied plaintiff's motion to strike; he ordered the clerk's entry of judgment on August 26 vacated; and he prepared and signed a written form of judgment and ordered entry of the judgment on December 4, 1980. On December 10, 1980, the judge entered a written order on defendants' motions. He denied the motions for judgment notwithstanding the verdict but ordered a new

trial on the issue of damages only unless the plaintiff would agree to a remittitur of that portion of the jury award which the court found to be excessive.

We find no fatal error in the foregoing procedure. It is contended that the judges who authorized the extension for filing new trial motions in August and September of 1980 acted beyond their jurisdiction because they had been disqualified from hearing the case. C.R.C.P. 97. Therefore, it is argued, the motions for new trial filed within the allegedly void extension period were not timely filed under C.R.C.P. 59(b) and the judgment entered by the court clerk on the jury verdict had become final. We do not agree for the following reasons.

The clerk's entry of judgment was not authorized under the circumstances present here. Ordinarily, under C.R.C.P. 58(a), the

clerk of the court, unless the court otherwise directs, shall forthwith prepare and enter the judgment without awaiting any direction form the court. In such case the entry of judgment is a ministerial act and participation by the judge is not required. Jones v. Galbasini, 134 Colo. 64, 299 P. 2d 503 (1956). See also, Joslin Dry Goods v. Villa Italia, 35 Colo. App. 252, 539 P. 2d 137 (1975). In this case, however, no judgment was entered upon the judge's verdict inasmuch as the trial judge declared a mistrial and ordered a new trial. Appellate proceedings in Tyler v. District Court, supra, resulted in reversal of the trial court's order declaring a mistrial and directions to the trial court "to vacate its order granting a mistrial and to enter a judgment in accordance with the verdict of the jury." The mandate required action by the

trial judge and the entry of judgment under these circumstances was not merely a ministerial act to be performed by the court clerk. It follows that, since there was no valid entry of judgment on August 26, the post-trial motions were not untimely filed and thus could properly be considered by the court after proper entry of judgment had been made.

The trial judge could not carry out the mandate of this court because of his absence from the country. It was necessary on his return that he correct the judgment record and vacate the improperly entered judgment, and thus cause a proper judgment to be entered on the jury's verdict as directed by this court. The judgment did not become effective until it was thus entered on December 4, 1980. We find no error in this procedure, and do not find the actions of the disqualified judges to be

determinative, especially when parties relying upon the orders filed motions wihtin time granted by the district court and the party contesting the order has not demonstrated that any harm resulted from this procedure.[1]

---

1. Compare, Converse v. Zinke, ___Colo___, 635 P.2d 882 (1981), where we recognized an exception to the express limitation in C.R.C.P. 50(b) and C.R.C.P. 6(b) in the time for filing a motion for judgment notwithstanding the verdict. There we held that when "a party reasonably relies and acts upon an erroneous or misleading statement or ruling by a trial court regarding the time for filing post-trial motions" the trial court does not lose its jurisdiction to rul on the motions filed within the extension period given.

To agree with the position taken by Dr.

It is further argued that the trial judge was without jurisdiction to order a new trial on the basis of jury misconduct without affidavits presented with the new trial motion. This argument misperceiveds the "excessive damages" ground for new trial in Rule 59(a)(5). This ground is not equivalent to jury misconduct as contemplated by C.R.C.P. 59 (a)(2) for which affidavits are required. See, Cawthra v. City of Greeley, 154 Colo. 483, 391 P.2d 876 (1964). Moreover, the trial judge is authorized by Rule 59 to order a new trial

---

Tyler that the time for filing of new trial motions should have been deemed to have run from the date of the first entry of verdict form in March of 1980 would have effectively cut off the defendant's right to appeal. See, In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976). This we do not condone.

on any valid ground within 15 days after entry of judgment, in this case December 4, 1980. The judge's rulings came within this time period.

II.

The respondent argues that this is not an appropriate circumstance for our exercise of original jurisdiction under C.A.R. 21. We do not agree. A writ of prohibition may be granted when a district court has acted in excess of its jurisdiction or has committed a gross abuse of discretion in circumstances where an appeal is neither an appropriate nor adequate remedy. See, e.g. Sanchez v. District Court, ___Colo___, 624 P.2d 1314(1981); Coquina Oil Co. v. District Court, ___Colo___, 623 P.2d 40 (1981); Prudential Property and Casualty Insurance Co. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979); Weaver Construction Co. v. District Court, 190 Colo.

227, 545 P.2d 1042 (1976). We find that the issues raised here are sufficient to meet out test for jurisdiction. When a retrial of all issues is warranted, a new trial limited to a single issue cannot adequately be remedied on appeal. Therefore, a writ of prohibition may here be available to "restrain rather than remedy an abuse of jurisdiction." Prudential Property and Casualty Insurance Co., supra, 617 P.2d at 558.

III.

In considering the motion for a new trial, the trial court found that the damages were excessive and stated: "It can only be concluded that the jury was influenced by bias, prejudice, and passion." In view of this finding, under the long standing rule in Colorado, the court could not properly limit the scope of the new trial to the single issue of damages. A new trial of

issues should have been ordered.

Generally, a trial court has the power to grant a new trial under C.R.C.P. 59 or in the alternative, to deny the new trial on the condition that the plaintiff will agree to a remittitur of the amount of the damages found by the court to be excessive. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 Colo. 361, 497 P.2d 997 (1972). When an award of damages is excessive but liability is clear, it may be permissible to order a new trial limited to the issue of damages only. Denton v. Navatril, 170 Colo. 158, 459 P.2d 761 (1969); King v. Avila, 127 Colo. 538, 259 P.2d 268 (1953); Murrow v. Whiteley, 125 Colo. 392, 244 P.2d 657 (1952); Belcaro Realty Investment Co. v. Norton, 102 Colo. 485, 87 P.2d 1114 (1939); Brncic v. Mets, 28 Colo. App. 204, 471 P.2d 618 (1970). As the court of appeals

stated in Kitto v. Gilbert, 39 Colo. App. 374, 570 P. 2d 544 (1977), concerning whether a retrial on all issues is warranted:

> "(T)he determinative considerations are those factors relating to fairness. The focus is on the relationship between the issues under the evidence and the practical logistics of retrial. If the issues are sufficiently distinct and separable so as to demonstrate the likelihood that jury determination of one would not affect its resolution of the other, and limited retrial can be accomplished without prejudicially (implicating) the prior verdict, then judicial economy and justice are served by restricting the scope of retrial." Id., 39 Colo. App. at 386-87, 570 P. 2d at 553.

See, Bassett v. O'Dell, 178 Colo. 425, 498 P. 2d 1134 (1972).

However, where the trial judge has made a finding that the excessive jury verdict resulted from bias, prejudice, and passion, firmly established precedent requires that a new trial on all issues be granted. The rationale for the rule, simply stated, is that once a jury verdict has been found to be

tainted by bias, prejudice, or passion, it is not possible in the usual case, where both liability and damages are contested, to determine the precise extent to which these improper factors have operated on the jury and infected the fact-finding function. Therefore, justice requires a retrial of the entire case in order to ensure a trial by an impartial jury. See, 6A Moore's Federal Practice, ¶ 59.06 at 59-84 (2nd ed. 1981); 3W Barron & A. Holtzoff, Federal Practice and Procedure, A 1305.1, at 375 (1958). The use of remittitur in such a case is an inappropriate remedy since it will not cure the defect inherent in a verdict resulting from bias, prejudice, or passion. See, Tunnel Mining and Leasing Co. v. Cooper, 50 Colo. 390, 115 P. 901 (1911); F.M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 P. 384 (1903); and Hartford Fire

Insurance Co. v. Kolar, 30 Colo. App. 1, 488 P.2d 1114 (1971). In such circumstances the balancing test described in Kitto, supra, usually utilized in a decision to re-try a single issue is inapposite. See, Tunnel Mining And Leasing Co., supra; Minneapolis, St. Paul & S. Ste, M. Ry. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931); Hash v. Hogan, 453 P.2d 468 (Alaska, 1969); Flieger v. Reeb, 120 Ariz. 31, 583 P.2d 1351 (1978); Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Cir. 1953); Brabham v. Mississippi, 96 F.2d 210 (5th Cir. 1938), cert denied, 305 U.S. 636, 85 S.Ct. 103, 83 L.Ed. 409.

The posture of this proceeding under Rule 21, with no record from the first trial, precludes our review of the finding of the trial court that the jury verdict was excessive due to bias, prejudice, and passion. Thus, we

hold only that once the trial court has made such a finding, that court may not order a remittitur or alternatively grant a limited new trial on the issue of damages only. Instead, the entire verdict must be invalidated and the fatal defect remedied by a new trial on all issues. We therefore direct the district court to order a new trial on all issues. The rule is made absolute.

SUPREME COURT, STATE OF COLORADO

Case No. 81SA431

ORIGINAL PROCEEDING

GALEN MARKS, ROBERT R. LARSEN, JOHN VOWELL, and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION,

Petitioners,

vs.

THE DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, and THE HONORABLE MARVIN W. FOOTE, one of the Judges thereof,

Respondents.

ORDER

Upon consideration of the Petition for rehearing filed by Donald E. Tyler in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, March 29, 1982.

JUSTICE LOHR does not participate.

VERDICT FOR PLAINTIFF

STATE OF COLORADO,)
) ss.
County of ADAMS,)

IN THE DISTRICT COURT WITHIN

AND FOR SAID COUNTY

DONALD E. TYLER, Plaintiff)
)
vs.) VERDICT
)
GALEN MARKS, ROBERT LARSEN,)
JOHN VOWELL, and BRIGHTON)
COMMUNITY HOSPITAL)
ASSOCIATION, Defendants)

We, the Jury find the issues herein joined for the Plaintiff Donald E. Tyler and assess his actual damages at the sum of $682,000.00 dollars ($682,000.00), assessing $170,500.00 against Defendant Marks, $170,500.00 against Defendant Larsen, $136,400 against Defendant Vowell, $204,600.00 against Defendant Vowell, $204,600.00 against Defendant Brighton Comm. Hospital. We assess his exemplary

damages at the sum of 48,000 dollars ($48,000.00), assessing $12,000.00 against Defendant Marks, $12,000.00 against Defendant Larsen, $12,000.00 against Defendant Vowell, $12,000.00 against Defendant Brighton Comm. Hospital.

(signed) A. A. Ellis
Foreman

QUESTIONS TO BE ANSWERED BY THE JURY

The Court instructs you to answer each of the following questions. Please answer each question yes or no.

1. Did Plaintiff suffer damage (actual or nominal) based upon breach of contract related to the corrective action procedure provided in the by laws? (Yes or No) YES

2. If question number 1 is answered "Yes," is Defendant Marks liable for such damages ? (Yes or No) YES

3. If question number 1 is answered "Yes," is Defendant Larsen liable for such damages? (Yes or No) YES

4. Did Plaintiff suffer damage based upon a conspiracy which caused his name to be omitted from the emergency room call list? (Yes or No) YES

5. If question number 4 is answered "Yes," is

Defendant Marks liable for such damages?

(Yes or No) YES

6. If question number 4 is answered "Yes," is Defendant Larsen liable for such damages?

(Yes or No) YES

7. If question number 4 is answered "Yes," is Defendant Vowell liable for such damages?

(Yes or No) YES

8. Did Plaintiff suffer damages based upon improper denial or reappointment to the medical staff? (Yes or No) YES

9. If question number 8 is answered "Yes," is Defendant Marks liable for such damages?

(Yes or No) YES

10. If question number 8 is answered "Yes," is Defendant Larsen liable for such damages?

(Yes or No) YES

11. If question number 8 is answered "Yes," is Defendant Vowell liable for such damages?

(Yes or No) YES

12. Did Plaintiff suffer damages based upon wrongful interference with his medical practice by any defendant? (Yes or No) YES

13. If question number 12 is answered "Yes," is Defendant Marks liable for such damages? (Yes or No) YES

14. If question number 12 is answered "Yes," is Defendant Larsen liable for such damages? (Yes or No) YES

15. If question number 12 is answered "Yes," is Defendant Vowell liable for such damages? (Yes or No) YES

16. If question number 12 is answered "Yes," is Defendant Brighton Community Hospital Association liable for such damages? (Yes or No) YES

17. Did Plaintiff suffer damages based upon Brighton Community Hospital Association ratifying any of the following alleged acts of

defendant's:

a. A conspiracy which caused Plaintiff's name to be omitted from the emergency room call list? (Yes or No) YES

b. Improper denial of the reappointment of Plaintiff to the medical staff? (Yes or No) YES

c. Intentional interference with Plaintiff's medical practice? (Yes or No) YES

18. Did plaintiff suffer damage based upon Defendant Marks abusing his privilege, by acting in bad faith, in connection with the writing of the letter of September 26, 1974? (Yes or No) YES

19. Did Defendant Vowell defame Plaintiff on December 29, 1974? (Yes or No) NO

(signed) A. A. Ellis
Foreman

No. 80SA144

Donald E. Tyler,

Petitioner,

v.

The District Court in and for the County of Adams, State of Colorado, the Honorable Marvin E. Foote, sitting as a judge of said Court, and Gregory Lyman, Clerk of said Court,

Respondents.

July 14, 1980

En Banc

Original Proceeding. Rule made absolute.

Donald E. Tyler, pro se

Zarlengo, Mott and Zarlengo, John C. Mott, Paul D. Renner, John R. Rodman, Frank Plaut, P.C., for respondents.

JUSTICE DUBOFSKY delivered the Opinion of the Court.

Petitioner Donald E. Tyler filed this original proceeding under C. A. R. 21 for relief in the nature of mandamus. He challenges as an abuse of discretion the trial court's ordering a mistrial when it discovered a second inconsistent signed jury verdict after the jury was discharged. We issued a rule to show cause and now make the rule absolute.

Petitioner, a former member of the medical staff of Brighton Community Hospital, filed suit against Galen Marks and Robert Larsen, physicians on the executive committee of the hospital; John Vowell, the hospital admistrator; and the Brighton Community Hospital Association, seeking damages for libel, slander, breach of contract, and interference with the practice of medicine.

The trial began February 19, 1980 and concluded on March 6. The trial court gave the jury two forms for general verdicts and

a set of interrogatories. When the jury returned to render the verdict, the judge received the jury's papers. The judge read into the record a verdict for the petitioner-plaintiff (the first verdict) which assessed actual damages of $682,000 and exemplary damages of $48,000.[1] The judge also read for the record the answers to the interrogatories, all but one of which were answered in the affirmative.[2] The judge then asked the jurors if this was their unanimous verdict, and they assented. Defense counsel requested a poll of the jury, and each juror responded that he or she agreed with the verdict as read by the trial court. The court accepted the verdict, ordered judgment entered in accordance with it, and discharged the jury.

A few hours later, the court advised the

plaintiff and defense counsel of an irregularity in the verdict and set a hearing for late afternoon. The hearing concerned a verdict for the defendant (the second verdict) signed by the foreman which the judge's clerk found amoung the jury papers. The verdict had not been mentioned by the foreman when the jury returned, and the trial court did not notice it.[3] The trial court found that the two verdicts were inconsistent and granted the defendant's motion of a mistrial. Because we find that the first verdict was the decision of the jury, we vacate as an abuse of discretion the trial court's order for a mistrial.

C.R.C.P. 47 governs rendition of jury verdicts:

> (q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall

> be asked by the court or clerk if they have agreed upon a verdict, and if the answer is in the affirmative, they shall hand the same to the clerk. The clerk shall enter in his records the names of the jurors. Upon a request of any party the jury may be polled.
> ...
> (s) Verdict Recorded. Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

The record here indicates that the court followed the proper procedure for declaring and recording a jury verdict. In addition, the judge questioned each juror individually.

A verdict shall be given effect if possible. However, a court may not lik beyond the face of the record to examine the thought processes of the jurors. If the intent is clear from the record, as in this case, the verdict shall be given effect. Martinez v. Huerta, 155 Colo. 555, 396 P.2d 237 (1964); Boynton v. Fox Theaters, 121 Colo. 227, 214 P.2d 793 (1950); Kinsell v. Stice, 109 Colo. 173, 123 P.2d 397

(1942); Drake v. Justice Gold Mining Company, 32 Colo. 259, 75 P. 912 (1904).

In Harper v. Blasi, 112 Colo. 518, 151 P2d 760 (1944), unlike the case before us, there was no record of the declaration and return of the jury verdict. No one knew of an inconsistent verdict until the preparation of the record for appeal. There, the confusion of verdict forms and instructions with no record to support one of the verdicts made it impossible to determine the jury's true decision. Cf. Calnon v. Sorel, 108 Colo. 467, 119 P. 2d 615 (1941).

Here the record is clear. The trial court read the verdict for the petitioner in open court, and all the jurors assented to it. Each juror was questioned, reinforcing the evidence of the jury's intentions.[4] The verdict for the petitioner in open court is

the verdict of the jury. Randles v. Lowry, 4 Cal. App. 3d 68, 84 Cal. Rptr. 321 (1970).

It follows that the second signed verdict form found by the clerk is not the verdict of the jury. Any irregularity of form in a verdict should be disregarded if it fairly appears that the jury intended a given verdict. Bartlett v. Hammond, 76 Colo. 171, 230 P. 109 (1924); Boynton, supra, Davis v. Shepard, 31 Colo. 141, 72 P. 57 (1903).

Thus there is no inconsistency because there is only one verdict. The verdict of the jury awarded the petitioner damages of $750,000 allocated as shown on the verdict form. The trial court is directed to vacate its order granting a mistrial and to enter a judgment in accordance with the verdict of the jury.

Rule made absolute.

1. Damages were allocated among the defendants by the jury. Actual damages: $170,500 against defendant Marks; $170,500 against defendant Larsen; $136,400 against defendant Vowell; $204,600 against the Hospital Association. Exemplary damages: $12,000 against Marks; $12,000 against Larsen; $12,000 against Vowell; $12,000 against the Hospital Association.

2. The only negative response was to a question regarding a specific act of defamation by defendant Vowell. The answer was consistent with the verdict for the petitioner.

3. Although the record is unclear, the second signed verdict apparently was among the papers handed to the court by the foreman.

4. Petitioner submitted affidavits from five of the six jurors that the verdict for the petitioner was their intended verdict. Because the record adequately supports the first verdict,

we do not consider the propriety of the affidavits.

IN THE SUPREME COURT OF THE

STATE OF COLORADO

No. 80SA144

DONALD E. TYLER,	)	
	)	
Petitioner,	)	Appeal from
	)	the District
vs.	)	Court of
	)	Adams
THE DISTRICT COURT IN	)	County
AND FOR THE COUNTY OF	)	
ADAMS, STATE OF	)	
COLORADO, the	)	
HONORABLE MARVIN E.	)	
FOOTE, sitting as judge	)	
of said Court, and GREGORY	)	
LYMAN, Clerk of said	)	
Court,	)	
Respondent.	)	

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said petitions shall be, and the same hereby are Denied.

BY THE COURT, EN BANC,

AUGUST 5, 1980.

CHIEF JUSTICE HODGES and JUSTICE ERICKSON do not participate.

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ADAMS

STATE OF COLORADO

Civil Action No. 28036, Division A

DONALD E. TYLER,	)	
	)	MOTION FOR
Plaintiff,	)	EXTENSION OF
	)	TIME WITHIN
vs.	)	WHICH TO FILE
	)	POST TRIAL
GALEN MARKS, et al.,	)	MOTIONS
	)	
Defendants.	)	

COME NOW the defendants, Galen Marks and Robert Larson, by counsel, Zarlengo, Mott and Zarlengo, and defendant Brighton Community Hospital, by counsel Paul D. Renner, P.C. and Frank Plaut, and respectfully request an extension of time to and including September 8, 1980 within which to file post trial motions in the captioned matter.

AS GROUNDS THEREFOR, the defendants

state:

1. On March 6, 1980, a verdict was returned for the plaintiff in the above captioned matter. At that time, counsel for the defendants requested 30 days within which to file post trial motions. The request was granted. Thereafter an inconsistency in the verdict form was discovered and after arguments of counsel were entertained by the court, the verdict was set aside.

2. Thereafter the plaintiff sought an original proceeding in the Supreme Court and on April 3, 1980 a Rule to Show Cause was issued to the District Court in and for the County of Adams, the Honorable Marvin E. Foote and Gregory Lyman, Clerk of said Court. Memoranda of Law was prepared by the defendants on behalf of the District Court and Clerk of Court and on July 14, 1980 the Supreme Court made the

Rule absolute directing that the verdict for the plaintiff be reinstated and that a judgment be entered accordingly. A Petition for Rehearing was timely filed and denied by the Court on August 5, 1980.

3. On August 7, 1980, the Remittitur was issued in the matter.

4. The Clerk of the Court informs the defendants that the extension of time within which to file the post trial motions is not recorded in the minute orders of the court.

5. The defendants herein show unto the court that due to the length and complexity of the trial and the desire of the defendants to co-ordinate their post trial motions in order to simplify to the greatest extent possible the issues before the court that their post trial motions cannot be adequately presented by August 22, 1980. The defendants believe that

they can prepare their post trial motions by September 8, 1980.

6. The defendants show unto the court that it is their belief that they have meritorious grounds for the granting of their post trial motions and that this extension of time is not requested for purposes of delay.

Respectfully submitted,

Paul D. Renner, P.C.

By (signed)
John R. Rodman, Reg. No. 5900

50 South Steele Street, Suite 777

Denver, Colorado 80209

Telephone: 388-4157

FRANK PLAUT, ESQ.

7000 West 14th Avenue

Lakewood, Colorado 80215

Telephone: 232-5151

ZARLENGO, MOTT & ZARLENGO

210 St. Paul Street

Suite 200

Denver, Colorado 80206

Telephone: 321-8585

ORDER

THE COURT having considered the Motion for Extension of Time Within Which to File Post Trial Motions of the defendants and being apprised of the premises,

DOES HEREBY grant the Motion permitting the filing of post trial motions by September 8, 1980.

Aug. 20, 1980 BY THE COURT:

(signed) Jean J. Jacobucci
DISTRICT COURT JUDGE

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ADAMS

STATE OF COLORADO

Civil Action No. 28036 Division A

DONALD E. TYLER,	)
	) REQUEST FOR
Plaintiff,	) EXTENSION OF
	) TIME WITHIN
v.	) WHICH TO FILE
	) POST TRIAL
GALEN MARKS, et al.,	) MOTIONS
	)
Defendants.	)

COMES NOW the defendant, Brighton Community Hospital, by counsel, Paul D. Renner, P.C., and Frank Plaut, and respectfully requests an extension of time to and including September 15, 1980 within which to file post trial motions.

AS GROUNDS THEREFOR, the defendant states:

1. On August 20, 1980 the defendants, Brighton Community Hospital, Galen Marks and Robert

Larson, requested and were granted an extension of time within which to file post trial motions until September 8, 1980. This is the only extension of time granted in this matter and was requested by the defendants with the sincere belief that the post trial motions could be adequately prepared and presented to this Court by September 8, 1980.

2. The attorney for defendant Brighton Community Hospital currently resides in Bend, Oregon and has worked diligently in attempting to prepare the post trial motions and to coordinate the post trial motions of Brighton Community Hospital with the post trial motions to be filed by defendant Galen Marks and Robert Larson. The attorney for defendants Galen Marks and Robert Larson has been on a previously scheduled vacation, having returned on September 2, 1980, and has not

been available to coordinate the post trial motions. This defendant has been informed that defendants Galen Marks and Robert Larson will also petition this Court for an extension of time until September 15, 1980 within which to file their post trial motions.

3. Although the attorney for Brighton Community Hospital has been working diligently on the post trial motions, the press of other business, including a trial in Oregon in which counsel is currently engated, and the length and complexity of the trial herein, prevents counsel from adequately preparing the post trial motions by September 8, 1980. The defendant believes that it can prepare its post trial motions and have them delivered from Bend, Oregon for filing by September 15, 1980.

4. The defendant shows unto the Court that

this one week request for extension of time is not requested for purposes of delay and that the defendant believes that it has meritorious grounds for granting its post trial motions.

Respectfully submitted,

PAUL D. RENNER, P.C.

By (signed)

John R. Rodman, Reg. No. 5900

50 South Steele Street, Suite 777

Denver, Colorado 80209

Telephone: (303) 388-4157

FRANK PLAUT, ESQ.

7000 West 14th Avenue

Lakewood, Colorado 80215

Telephone: (303) 232-5151

ATTORNEYS FOR DEFENDANT

BRIGHTON COMMUNITY

HOSPITAL

ORDER

THE COURT having considered the Request for Extension of Time within which to File Post Trial Motions of the defendant, Brighton Community Hospital, and being apprised of the premises,

DOES HEREBY grant the Motion permitting the filing of post trial motions by and including September 15, 1980.

BY THE COURT:

(signed) James J. Delaney
District Court Judge

Sept 4, 1980
Date

The District Court
of the

Seventeenth Judicial District

Hall of Justice

Brighton, Colorado 80601

Chambers of
Judge Jean J. Jacobucci

Chief Judge
Courts of the
17th Judicial Dist.

June 23, 1976

Honorable Edward E. Pringle

Chief Justice

Colorado Supreme Court

St ate Capitol Building

Denver, Colorado 80203

Re: Donald E. Tyler, Plaintiff

v.

Galen Marks, et al., Defendants

Civil Action No. 28036

Dear Justice Pringle:

We have a series of cases involving Dr.

Tyler, who is also an attorney, and various other doctors in the community. All of the District Judges here have disqualified themselves from hearing this series of cases. One previous case has been assigned by you to Judge Dean Johnson. All of the attorneys would be pleased to have him assigned to this case.

Sincerely yours,

(signed)
Jean J. Jacobucci

JJJ:bt

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ADAMS

STATE OF COLORADO

Civil Action No. 28036

DONALD E. TYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
GALEN MARKS, ROBERT R. LARSEN, JOHN VOWELL, and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION,	)	
	)	
Defendants.	)	

It appearing that judgments in this case were improvidently entered in the register of actions on August 26, 1980, prior to issuance of an order by the trial court setting aside its order of March 7, 1980, granting a mistrial, and it further appearing that the premature entry of judgment would bar any action under Rule 59, Colorado Rules of Civil Procedure, by trial Judge to whom this case is assigned.

It is Ordered that all the entries of judgment made on August 27, 1980, be stricken from the record.

Done in Open Court this 4th day of December, 1980.

By the Court:

(signed)

Marvin W. Foote,
District Judge

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ADAMS

STATE OF COLORADO

Civil Action No. 28036

DONALD E. TYLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
GALEN MARKS, ROBERT LARSEN, JOHN VOWELL and BRIGHTON COMMUNITY HOSPITAL ASSOCIATION,	)	
	)	
Defendants.	)	

All defendants have filed Motions for Judgment Notwithstanding the Verdict or for New Trial, with accompanying briefs. The Court heard oral argument, took the matter under advisement and now rules as follows:

As for the Motions for Judgment n.o.v., the Court reaffirms its previous rulings that there was sufficient testimony to go to the jury.

In regard to the Motions for New Trial:

Testimony concerning other litigation brought by the Plaintiff was not admissable in this case. The issue was whether the Defendants in this case were liable and if so the extent of Plaintiff's damages. Defendants and their counsel urged that a separate verdict should have been returned for each claim for relief. This would have involved giving the jury no fewer than thirty-four forms of verdict. An assignment of a monetary value to each one would have presented the jury with an impossible task. The claims of Plaintiff were based on the totality of the acts of each defendant and the damages sought as a result.

The other matters raised by Defendants' counsel were fully argued during the course of the trial. The Court reaffirms its rulings previously made as to each one.

However, the Court finds that the jury awarded excessive damages. Plaintiff's testimony disclosed a complete failure to mitigate his damages subsequent to 1976. The liability of Brighton Community Hospital Association is vicarious, yet the damages assessed against it were the largest amounts awarded. It can only be concluded that the jury was infludenced by bias, prejudice and passion. The record just does not support a verdict totaling $628,000 in compensatory damages.

The Motions for New Trial are granted as to damages only unless within 15 days from this date Plaintiff remits that portion of the award, which the Court deems to be excessive; namely, the sum of $141,395.37 as to Defendant Marks, $141,395.37 as to Defendant Larsen, $113,116.25 as to Defendant Vowell and

and $192,376.06 as to defendant Brighton Community Hospital Association, thereby reducing the amount of the judgments to be entered herein to the following:

Plaintiff Donald E. Tyler to have and recover from Defendant Galen Marks the sum of $29,104.63 compensatory damages and $12,000 exemplary damages; Plaintiff Donald E. Tyler to have and recover from Defendant Robert Larsen the sum of $29,104.63 compensatory damages and $12,000 exemplary damages; Plaintiff Donald E. Tyler to have and recover from Defendant John Vowell the sum of $23,283.75 compensatory damages adn $12,000 exemplary damages; Plaintiff Donald E. Tyler to have and recover from Defendant Brighton Community Hospital Association the sum of $12,223.94 compensatory damages and $12,000 exemplary damages.

Each party to pay own costs.

Done in open Court this 10th day of December, 1980.

BY THE COURT:

(signed)

Marvin W. Foote, District Judge